STATE OF WISCONSIN PERSONNEL COMMISSION

JOHN L. HOLLEY,
Appellant,

v.

Secretary, DEPARTMENT OF COMMERCE,
Respondent.

Case No. 98-0016-PC

INTERIM
DECISION
AND
ORDER

This matter is before the Personnel Commission as an appeal arising from the decision not to hire the appellant. The issue for hearing reads:

> Whether respondent committed an illegal action or an abuse of discretion in connection with the alleged offer and withdrawal of appointment to the position in question.

After the completion of an administrative hearing, the parties filed briefs, and the hearing examiner issued a proposed decision and order pursuant to §227.46(2), Stats. This matter is now before the Commission following consideration of the parties' arguments and objections with respect to the proposed decision and order. The Commission agrees with and adopts the examiner's findings of fact as set forth in the proposed decision. The Commission also agrees with the proposed decision's conclusions that appellant has not established either that respondent abused its discretion with respect to its failure to have hired complainant in the position in question, or that respondent violated §230.43(2), Stats., and adopts so much of the decision as is consistent with these conclusions. For the following reasons, the Commission does not agree with either the proposed decision's conclusion that respondent has waived its right to object to the introduction into this proceeding via complainant's post-hearing brief of an issue under the WFEA (Wisconsin Fair Employment Act), or its conclusion that it is appropriate to effectively allow the reference in complainant's brief to serve as

an amendment to the original appeal and to proceed to decide the WFEA issue thus presented without further notice and opportunity for hearing.

Appellant first mentions the issue of disability discrimination in the last paragraph of his post-hearing brief with the examiner, as follows:

> The Department of Commerce *may* have been impermissibly motivated in the rejection of employment by concerns about foot [sic] and alcoholism. Under state and federal disability anti-discrimination laws (i. e., the Wisconsin Fair Employment Act, Wis. Stats. 111.31 et seq) and the Americans with Disabilities Act 42 USC 12101 et seq) an employer may not refuse to hire an individual due to an (in this case, an alleged) disability who is otherwise qualified. (emphasis added)

At least in the context of appellant's post-hearing brief, the appellant's only directly argued claims of illegal actions involved violations of §§230.43(1)(d) and 230.43(2), Stats. The above-quoted last paragraph from complainant's post-hearing brief mentions only the possibility that respondent might have violated either the WFEA, a law which was not referred to in either the issue for hearing or the statutory basis for hearing in the notice of hearing,[1] or the ADA, a law which is clearly outside the Commission's jurisdiction. Under these circumstances, there is a significant question as to whether respondent had an obligation to have objected to this paragraph in appellant's brief in order to avoid a waiver of objection to a WFEA issue being added at this stage of the proceeding.

The law of waiver recognizes that it is possible to effect a waiver by silence or inaction, but it has been held that "Like all waiver predicated upon silence, however, there must have been reasonable opportunity, as well as omission, to object." *Luther v. C. J. Luther Co.,* 118 Wis. 2d 112, 128, 94 N. W. 69 (1903). *See also* 28 Am. Jur. 2d §161, p. 845-46:

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[1] The prehearing conference states that the jurisdictional basis for the hearing is §230.44(1)(d), Stats., which provides for appeals of post-certification personnel actions related to the hiring process which are alleged to be illegal or an abuse of discretion.

> A waiver . . . may be express or implied . . . where an implied waiver is claimed, caution must be exercised, for waiver will not be implied from doubtful acts.
>
> Generally, to make out a case of implied waiver of a legal right, there must be a clear, unequivocal, and decisive act of the party showing such a purpose or acts amounting to an estoppel on his part. . . Mere silence, however, is no waiver unless there is an obligation to speak. Passivity or even somnolence under continued aggression is not in itself a surrender of rights. (footnotes omitted)

In the instant case, the question is whether appellant's tentative reference in its post-hearing brief to a WFEA violation was sufficient to have created the obligation for respondent to have objected to consideration of such a claim at pain of creating an implied waiver. The *Luther* case includes some language that appears relevant to this inquiry, albeit the significance of its holding must be considered in the context of the era's relatively archaic approach to pleading:

> Like all waiver predicated upon silence, however, there must have been reasonable opportunity, as well as omission, to object. When evidence is offered which is pertinent to the cause stated in the complaint, it naturally is assumed to be offered in support of the cause of action so stated, and mere omission to object to it cannot, with reason, be ascribed to defendant's willingness that some other and unstated cause of action be tried, to which also that evidence may be competent. The same considerations forbid any inference of consent that an incongruous cause may be joined, from omission to object by demurrer or answer, when the complainant seeks no such joinder. It is not until the plaintiff reasonably notifies defendant of his desire to make such joinder, either by offering evidence unambiguously tending to support such additional cause of action or by offer to amend, that the latter can be deemed by silence to consent thereto or waive objection. Demurrer for multifariousness could not have been sustained to this complaint, for it certainly does not state any separate cause of action for recovery of the patent from defendant *Bolens*. The duty to object did not arise upon introduction of evidence with reference thereto, for such evidence was admissible, and apparently offered upon the issue as to the relative fidelity, or the reverse, of *Luther* and *Bolens* to the corporate welfare. It is clear that defendant *Bolens* never was so placed that silence on his part could be deemed to waive

> objection to adjudication in this action of a right of the corporation to enforce the conveyance of this patent to it. *Id.* (citation omitted)

In the instant case, any failure by respondent to have objected to evidence at the hearing relevant to the WFEA claim (first alluded to in complainant's post-hearing brief) should not contribute to a waiver of objection to a WFEA claim, because of the overlap between the abuse of discretion issue, which had been noticed for hearing, and the subjects of complainant's perceived or actual disabilities. The tentative reference in complainant's brief to the WFEA (and the ADA, which is clearly outside the commission's jurisdiction) in itself does not indicate complainant was seeking to amend his appeal. Post-hearing briefs not infrequently contain irrelevant material. In the Commission's opinion, it can not be concluded that under the circumstances respondent reasonably should have foreseen the possibility that complainant's reference to the WFEA, coupled with respondent's failure to object to that reference, would be converted *sua sponte* and without prior notice into an accomplished amendment converting a civil service appeal into a WFEA claim, and accompanied immediately by the adjudication of the claim and the establishment of liability.

This conclusion that there was not an effective waiver of the interjection of the WFEA claim leads to an issue the proposed decision did not address—whether complainant should be allowed at this point to amend his appeal pursuant to *Hiegel v. LIRC,* 121 Wis. 2d 205, 212, 359 N. W. 2d 405 (Ct. App. 1984).

In *Hiegel,* the complainant was pro se when she filed her equal pay charge with ERD. She subsequently retained counsel, who represented her at her ERD hearing and attempted to introduce evidence relating to respondent's hiring practices. The hearing examiner sustained the employer's objection to this evidence on the ground that there had been no notice that the employer's hiring practices would be at issue in the proceeding. The Court of Appeals held that "while it is true that [the employer] received inadequate notice of the discriminatory hiring issue, we agree with the circuit court that it would have been more reasonable for the hearing examiner to allow [complainant] to amend her complaint and to adjourn the hearing for a sufficient period

of time to allow [the employer] to prepare to meet the proposed evidence," and went on to conclude that the exclusion of the evidence pertaining to sex discrimination in hiring deprived complainant of her right to due process.

In the instant case, not only does the proposed decision not address the question of whether complainant's reference in his post-hearing brief should be allowed to stand as an amendment to this appeal, but also it does not appear that the parties have ever addressed this issue in the course of this proceeding. Deciding whether to permit an appeal involves an informed exercise of discretion. *See e. g., Oakley v. Commissioner of Securities,* 78-66-PC, 10/10/78. This discretionary decision can properly consider numerous factors. *See, e. g., Kloehn v. DHSS,* 86-0009-PC-ER, 1/10/90 where the Commission addressed complainant's motion to amend after having heard the parties' arguments on the motion:

> Here, the Commission, prior to receiving complainant's request to amend, had not only issued an initial determination but had also already held a hearing on the issue of probable cause and issued a proposed decision and order; the complainant is represented by an attorney and has been since early in 1988; the complainant conducted extensive discovery prior to the hearing, including discovery as to the employment records of other probationary lieutenants, including Joan Schaefer; the complainant urged the narrowing of the sex discrimination issue in April of 1988 in order to consider only the allegations of sexual harassment; and the complainant has offered no basis for the amendment other than an after-the-hearing realization that another theory could apply to the facts of this case. This is a clearly insufficient basis for the Commission to rely upon in granting approval of the proposed amendment particularly in view of the advanced stage of the proceedings; the ample opportunity the complainant had to amend prior to this stage; and the fact that an allegation of disparate treatment could have and should have been obvious to the complainant and/or his attorney at the point that discovery was completed, if not before, in view of the common application of a disparate treatment analysis in cases of this nature and in view of the nature of the discovery done in this case. *Kloehn,* p. 6.

The Commission then went on to reject complainant's argument that an amendment to the complaint would not require any additional hearing, noting, among other things, that:

> [E]ven though it is true that the Commission, in its Interim Decision and Order on the issue of probable cause, did make certain comparisons between the work record of complainant and certain other probationary lieutenants, including Ms. Schaefer, this was done for the sole purpose of determining whether sufficient nexus existed between complainant's termination and the alleged rebuff by complainant of Ms. Lyon's romantic overtures to support a finding of probable cause to believe that sexual harassment of complainant had occurred. It is clear from the language of this Interim Decision and Order that the Commission did not intend to and did not decide that respondent's termination of complainant resulted from respondent's disparate treatment of complainant on the basis of sex outside the context of complainant's claim of sexual harassment. *Kloehn,* p. 7.

To reiterate, in the instant case the parties have not had the opportunity either to present arguments on a possible amendment or to make a record on this issue. The Administrative Procedure Act (Chapter 227, Stats.) requires proper notice of the scope of a contested case hearing. *See, e. g., Kropiwka v. DILHR,* 87 Wis. 2d 709, 275 N. W. 2d 881 (1979); *Chicago, M., St. P. & P. RR. Co. v. ILHR Dept.,* 62 Wis. 2d 392, 399-400, 215 N. W. 2d 443 (1974); Therefore, the Commission will remand this matter to the hearing examiner to determine, after the parties have an opportunity for input, whether to permit amendment of the appeal by the material concerning the WFEA set forth in complainant's post-hearing brief, and to conduct such further evidentiary proceedings as he should deem necessary.

ORDER

1. The Commission adopts all of the findings of fact in the proposed decision and order (a copy of the proposed decision and order is attached hereto), subject to the proviso that they are subject to modification on a showing by either party in further proceedings before the hearing examiner that because of the lack of notice of the WFEA claim, the party did not have an adequate opportunity to have made a more complete record with respect to any findings that are relevant to the WFEA claim.

2. The Commission adopts the proposed decision's conclusions of law #1 (with the exception of the conclusion that the Commission's jurisdiction under

§230.45(1)(b), Stats., has been invoked) and #2, and rejects the remaining conclusions of law for the reasons discussed above.

3. The Commission adopts the opinion section of the proposed decision from its beginning on page 8 of the proposed decision, and continuing through the first full paragraph under the heading "Illegal action aspect of the case" on page 12.

4. The Commission rejects that part of the proposed opinion beginning with the last paragraph on page 12 and continuing through the last paragraph on page 17.

5. The Commission rejects the proposed order set forth on page 18.

6. This matter is remanded to the hearing examiner with directions to conduct further proceedings consistent with this decision.

Dated: January 13, 1999.

STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

DONALD R. MURPHY, Commissioner

JUDY M. ROGERS, Commissioner

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Parties:
John Holley
1607 Hedgestone Lane
Howards Grove, WI 53083

Brenda J. Blanchard
Secretary, DOCom
P. O. Box 7970
Madison, WI 53707-7970

STATE OF WISCONSIN PERSONNEL COMMISSION

JOHN L. HOLLEY,
Appellant,

v.

Secretary, DEPARTMENT OF COMMERCE,
Respondent.

Case No. 98-0016-PC

PROPOSED
DECISION
AND
ORDER

This matter is before the Personnel Commission as an appeal arising from the decision not to hire the appellant. The issue for hearing reads:

> Whether respondent committed an illegal action or an abuse of discretion in connection with the alleged offer and withdrawal of appointment to the position in question.

After the completion of an administrative hearing, the parties filed briefs.

FINDINGS OF FACT

1. Respondent's Safety and Buildings Division carries out the elevator inspection program for the State of Wisconsin.

2. The inspections are performed by Elevator Safety Inspectors. They have the following responsibilities:

> Inspect existing elevators and related lift equipment within a geographical area to ensure safe operation and compliance with State and National safety codes. Write orders to require correction of code and safety violations, shut down unsafe equipment and provide additional enforcement action as necessary. Prepare detailed inspection reports, make recommendations to owners and participate in prosecution activities. Oversee safety testing of newly installed elevators and related equipment, and evaluate results to determine compliance with safety codes. . . . This position requires the ability to bend, stoop and climb for the inspection of elevators. (Comm. Exh. 14)

3. Respondent announced two vacancies at the Elevator Safety Inspector 2 level. Appellant applied, was certified and was one of four candidates who were interviewed for the vacancies.

4. The interviews were conducted by a three-person panel consisting of Bennette Burks, who served as the Director of the Field Operations Bureau in the Safety and Buildings Division, George Pablocki and Larry Swaziek.

5. Appellant was interviewed on December 10, 1997. (Comm. Exh. 12) The interviewers were provided with appellant's resume and his letters of reference.

6. Appellant's resume (Comm. Exh. 4) indicated that from 1992 to "present," appellant worked as a certified elevator mechanic for the Otis Elevator Company in Sheboygan, Wisconsin, maintaining and repairing 84 elevator units. It also showed that appellant had worked in a similar capacity for the U. S. Elevator Company in St. Louis from 1989 to 1992 and for the Otis Elevator Company in St. Louis from 1981 to 1989. The resume listed four references, including the director of maintenance at a condominium resort, the plant operations manager at the Sheboygan Memorial Medical Center, the building services manager at Sheboygan County Building Services, and Tim Marty, State Elevator Safety Inspector, Appleton area.

7. The interviewers were provided positive letters of reference (Comm. Exh. 5, 6 and 7) from each of the first three listed references in appellant's resume. One of the three reference letters was undated. The other two bore March of 1997 dates.

8. Appellant also submitted a listing of his supervisors (Comm. Exh. 8) starting in 1981.

9. The interviews consisted of eight questions. The interviewers graded responses according to benchmarks that were assigned to each of the following categories: "More Than Acceptable," "Acceptable," "Less Than Acceptable" and "Unacceptable." The appellant received "Acceptable" ratings by every interviewer and for every question, except two "Less Than Acceptable" ratings by one interviewer, two

"Less Than Acceptable" and one "More Than Acceptable" rating by the second interviewer, and one "Less Than Acceptable" rating from the third interviewer.

10. At the time of the interview, George Pablocki referred to "bad blood" between appellant and Bernie Zalewski, an elevator inspector employed by respondent.

11. Mr. Burks telephoned the appellant on or about February 13th. During the telephone conversation, Mr. Burks indicated that he recommended appellant be hired for the vacancy in the respondent's district office in Waukesha. Mr. Burks indicated that appellant would be permitted to work out of his home in Sheboygan County and asked when the appellant would be able to start work. Appellant indicated he would accept the job working for respondent and was willing to commence work on March 2nd. The appellant understood that he would start work at 8:00 on Monday, March 2nd. Mr. Burk indicated that his office would take care of making a hotel reservation for the evening of March 1.

12. At the end of the February 13th conversation, Mr. Burks asked, "Oh, by the way, is there any bad blood between you and Bernie Zalewski?" Appellant responded, "If there is any bad blood it is on Bernie's side. I don't see him that much."

13. By memo (Commission's Exhibit 3) dated February 18th, Mr. Burks wrote Dale Bartz, a human resources specialist employed by respondent, as follows:

> I have completed interviews for the Elevator Safety Inspector 2 positions in the Bureau of Field Operations, Division of Safety and Buildings. When the interviews were completed, the candidates were ranked in acceptability. Based on these rankings, I recommended Frank Wozniak for the Waukesha position and Jerry Rowell for the Madison position. Both declined the offers I made. I now recommend John L. Holley for the Waukesha position. The following are reasons I feel Mr. Holley is well-qualified for the position:
>
> - Numerous years' experience as elevator inspectors and/or elevator mechanics;
> - Strong recommendations by references, and
> - Strong performance at his interview
>
> Mr. Rowell has indicated that he would like to discuss his offer. I will advise any progress I make.

> If you approve this selection, please sign below. Mr. Holley has indicated that he would like to begin March 2, 1998.

The memo included signature lines for Ron Buchholz, Mike Corry (Division Administrator) and Martha Kerner. The memo is in the nature of a form letter that Mr. Burks used when making a hiring recommendation.

14. On February 18, appellant gave notice to his employer at that time, Schindler Elevator Company. (Exh. 13) The appellant had been working for Schindler since the end of January, 1998.

15. Jo Kerr, a program assistant with respondent, called appellant on or about February 20, and confirmed he had a hotel reservation at the Inn on the Park for March 1st (exh. 13). She told appellant that his starting time was 7:45 a.m. on March 2nd. Ms. Kerr asked appellant if he had received a letter of acceptance from the respondent. Appellant told her he had not. Ms. Kerr said that such letters were always late in getting out, and told him, "Welcome aboard."

16. On or after February 18, Mr. Burks issued an E-mail message to existing inspection staff. The message identified the appellant as one of two individuals who had been recommended for hire to vacant Elevator Inspector positions.

17. On approximately February 21, 1998, Mike Corry, Division Administrator, advised Mr. Burks that he wanted Mr. Burks to interview at least 5 candidates for any position, including the current Elevator Inspector vacancy, before making any recommendation for hire.

18. Bernie Zalewski was employed as an Elevator Safety Specialist and was assigned to Distict 3, which covered the counties of Calumet, Sheboygan, Ozaukee and Milwaukee.

19. During the morning of February 24th, after Mr. Burkes had issued the e-mail message described in Finding 16, Bernie Zalewski contacted Mr. Burks and informed him of various concerns about employing appellant. Mr. Zalewski expressed a strong concern about employing appellant as an elevator inspector based on Mr. Zalewski's conclusion that appellant could not satisfactorily perform the duties of the posi-

tion. This conclusion was based on the large number of violations found by Mr. Zalewski when inspecting elevators serviced by appellant, significantly more violations than for the many other technicians who performed work on elevators inspected by Mr. Zalewski. Mr. Zalewski also stated that he had smelled a strong odor of alcohol on appellant at a job site and that appellant suffered from a foot ailment that made it difficult to stand. Mr. Zalewski's comments were based on observations he had made of appellant in approximately 1993. Based on those observations, Mr. Zalewski had a question as to whether appellant could safely perform the duties of an elevator safety inspector, including getting into elevator pits and on to elevator car tops. Mr. Zalewski also provided Mr. Burks with the names of Tim Marty and George Rather to contact to verify his observations and to get more information. Mr. Burks had known Mr. Zalewski for approximately 9 years, had worked with him for approximately 2 years and had found information provided by him to be accurate and reliable.

20. Respondent followed up on this information provided by Mr. Zalewski.

21. At Mr. Burks' directive, Harold T. Stanlick (Section Chief for Field Operations in Waukesha) spoke with Tim Marty, an elevator inspector in the Green Bay office who had inspected appellant's work. Mr. Marty said that in inspecting appellant's work, the quality was "not all that good and that corrections would have to be made."

22. Mr. Stanlick also spoke with George Rather at Otis Elevator in Sheboygan. Mr. Rather was familiar with appellant's work which he described as not up to the employer's standard.

23. Later on the 24th of February, Mr. Stanlick wrote the following memo to Mr. Burks:

> Talked to Tim Marty about John Holley as he has worked with him. Tim's comments were that he could not rate Mr. Holley very high as his work was not up to standard and knows that he had physical problems that would affect his work.
>
> Talked to Mr. Holley's former employer. Mr. Rather wanted to remain anonymous. He stated that they laid Mr. Holley off because he did not

> do his work to their standard. He was also found with alcohol on the job and had at least two bouts with alcohol. They also stated that Mr. Holley had trouble with his feet and could not stand on them all day. They would not hire Mr. Holley back.

24. Mr. Burks had worked with Mr. Stanlick for approximately 8 years and found information provided by him to be accurate and reliable.

25. In a February 24, 1998, memo to Dale Bartz, (Commission's Exhibit 1) Mr. Burks wrote:

> On February 18, I sent you a memo recommending John L. Holley for the position of elevator inspector assigned to the Waukesha office. I made the recommendation based on information I had at the time. Since making that initial recommendation, I have learned that Mr. Holley has had problems with on-the-job alcohol use and suffers from a foot ailment that impedes his ability to stand. I withdraw my recommendation.
>
> Some of the information was provided to me this morning by Bernie Zalewski, an elevator inspector who has first-hand experience with Mr. Holley. According to Bernie, Mr. Holley was not maintaining elevators properly, causing Bernie to issue numerous orders for safety violations. Bernie also alleged alcohol and foot ailments and stated that Tim Marty, another elevator inspector, and Richard Rather, one of Mr. Holley's former supervisors could provide further information. I instructed the section chief for the Waukesha area, Harold Stanlick to contact these persons and confirm Bernie's observations. Bernie's information was confirmed by the other contacts.
>
> According to Harold, Tim's observations were similar to Bernie's. Mr. Rather reported that Mr. Holley was involved in at least two alcohol-related episodes and was not maintaining equipment as required by Otis Elevator Co. (Holley's employer at the time) standards. Otis Elevator Co. would not hire Mr. Holley back.
>
> At this time, there are no other candidates from the Waukesha area I can recommend. The position should be re-advertised. . . .

26. Mr. Burks telephoned appellant and advised him that he would not be receiving an employment offer. Mr. Burks told appellant that the reason for this action

was that he had been advised by Mike Corry, Division Administrator, to interview at least 5 candidates before making a recommendation.

27. After Mr. Burks withdrew the recommendation, he had contact with a hotel manager in the Sheboygan area who was familiar with appellant's work as an Otis elevator service technician. The manager reported that appellant had performance problems and that the owner of the facility believed negative comments by appellant to a potential buyer of the facility had caused the sale to fall through.

28. Respondent later issued a re-announcement for the vacancy.

29. The appellant did not work for a period of approximately 14 months ending in January of 1998, due to a foot problem that required surgery. He was on medical leave until approximately September of 1997, and then received unemployment compensation. At the time of his interview with respondent in December of 1997, appellant had been released to return to work by his physician but was not employed. In his December interview, appellant stated that his foot had fully recovered.

30. The appellant was able to return to work with Schindler after the position with respondent fell through in February of 1998. Appellant continued on a full time basis with Schindler until March 17th when the particular remodeling job he had been working on ended.

31. Appellant started work as a service mechanic with Montgomery-Coney Elevator at the end of April of 1998. His salary is $24.67 per hour and he works full time.

32. Appellant would not have been hired by respondent for the vacant elevator inspector position even if respondent had not considered his foot ailment.

CONCLUSIONS OF LAW

1. The Personnel Commission has jurisdiction over this matter pursuant to §230.44(1)(d) and 230.45(1)(b).

2. The appellant has failed to sustain his burden of establishing that respondent's personnel actions were an abuse of discretion.

3. The appellant has the burden to establish that he satisfies the definition of an "individual with a disability" under §111.32(8).

4. The appellant has established that respondent perceived him as suffering from a disabling foot ailment. However, appellant has failed to establish that he suffers from alcoholism, was perceived by respondent as an alcoholic or has a record of such an impairment.

5. Respondent has failed to establish a "rational relationship" between its safety obligations to the public and the actual condition of appellant's foot.

6. Respondent violated the Fair Employment Act when it relied on appellant's foot ailment as a basis for withdrawing the recommendation to hire the appellant for the vacant elevator inspector position.

7. Appellant would not have been hired for the vacant elevator inspector position even if respondent had not considered the impermissible factor.

OPINION

This matter is being reviewed pursuant to the Commission's authority under §230.44(1)(d), Stats., which provides:

> A personnel action after certification which is related to the hiring process in the classified service and which is alleged to be illegal or an abuse of discretion may be appealed to the commission.

First, the Commission addresses appellant's claim that respondent failed to fulfill the terms of an agreement with appellant to hire him for the elevator inspection vacancy. This claim hinges on resolution of a dispute as to what was said by Mr. Burks to appellant during the telephone conversation on or about February 13, 1998. Appellant insists that he was offered the position in question by Mr. Burks at that time, while Mr. Burks testified that he would only have advised appellant that he was being *recommended* for the position. It is clear that Mr. Burks did not have the authority to hire the appellant. Documents generated at the time indicate that Mr. Burks also understood he

did not have the authority to hire the appellant.[1] That authority rested with the department secretary, William McCoshen, and it is undisputed that Mr. McCoshen never took such an action. The Commission concludes that while the appellant understood that he had been offered the job, no unconditional employment offer had actually been made to him by respondent. There is nothing in written form that tends to support appellant's contention that he accepted a formal offer of employment.

Abuse of discretion aspect of case

In *Ebert v. DILHR*, 81-64-PC, 11/9/83, the Commission held:

> The term "abuse of discretion" has been defined as "a discretion exercised to an end or purpose not justified by, and clearly against, reason and evidence." *Lundeen v. DOA*, 79-208-PC, 6/3/81. The question before the Commission is not whether it agrees or disagrees with the appointing authority's decision, in the sense of whether the Commission would have made the same decision if it substituted its judgment for that of the appointing authority. Rather, it is a question of whether, on the basis of the facts and evidence presented, the decision of the appointing authority may be said to have been "clearly against reason and evidence." *Harbort v. DILHR*, 81-74-PC, 4/2/82.

Viewing respondent's decision in terms of the decision by Mr. Burks to withdraw his recommendation of hiring the appellant as an elevator inspector, there was no abuse of discretion because the decision was not "clearly against reason and evidence." While Mr. Burks had interviewed the appellant and had reviewed the documents that were made available to the interview panel, he later received information from a variety of sources indicating that appellant was not a desirable candidate for the vacancy. Mr. Zalewski told him: 1) appellant's elevator technician work generated numerous violations; 2) he had smelled a strong odor of alcohol on appellant at a job site; and 3) appellant suffered from a foot ailment. Tim Marty, an elevator inspector in the Green Bay office, reported through Mr. Stanlick that appellant's work was not up to standard

[1] In the February 18th memo to Dale Bartz, Mr. Burks stated he "recommended" Mr. Holley for the position and requested signatures from Ron Buchholz, Mike Corry and Martha Kerner *if they approved* the selection.

and that appellant had "physical problems that would affect his work." George Rather, who worked at Otis Elevator in Sheboygan, said they would not rehire the appellant. He explained that appellant did not work to their standard, could not stand all day because of foot problems, had been found with alcohol on the job and had "at least two bouts with alcohol." Mr. Burks considered both Mr. Zalewski and Mr. Stanlick to be reliable based upon his lengthy working relationships with them. The only counterweights to these negative evaluations of appellant's work as an elevator technician were the three letters of recommendation that were submitted along with appellant's resume. Two were issued in March of 1997, nearly a year before the decision in question, while the third was undated. It was not unreasonable for Mr. Burks to choose to rely on the multiple sources of negative information about appellant's work history, rather than to simply ignore that information and proceed with the hiring process.

Mr. Burks could have sought even more information about the appellant before he decided to withdraw the recommendation. He could have contacted the persons who supplied appellant's written references for more specific information. However, the "abuse of discretion" standard did not require Mr. Burks to do more than he did. Mr. Burks knew that the elevator inspections would be performed out of the appellant's home and away from the respondent's district office in Waukesha, making it difficult for respondent to provide oversight of his work. Mr. Burks already had three different sources of negative information about the appellant's performance. Two were from existing employes of the department, and one was from a person (Mr. Marty) listed on appellant's resume as a reference. The negative information was both consistent and significant. The issue is not what else could have been done. The issue is whether the decision that was made was clearly against reason and evidence. The answer is "no."[2]

Appellant also has essentially alleged that Mr. Zalewski committed an abuse of discretion, on behalf of the respondent, when he provided misleading and inaccurate

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[2] After he made his decision to withdraw his recommendation of appellant for the position, Mr. Burks received confirming information in the form of comments from a hotel operator in the Sheboygan area who said that appellant had performance problems.

information to Mr. Burks, and that Mr. Zalewski was motivated by his interest in protecting his own geographic area of responsibility for elevator inspections.

As of February 24, 1998, Mr. Zalewski was assigned to perform elevator inspections for Calumet, Sheboygan, Ozaukee and Milwaukee counties. His contacts with appellant in the Sheboygan area would have been in approximately 1993 or 1994, when he also had inspection responsibilities in that area. In approximately 1995, Mr. Zalewski moved into a job as a supervisor and remained there until February of 1998. Appellant did not show that, had he been hired into one of the vacant elevator inspector positions, Mr. Zalewski's responsibilities would have been affected negatively. Mr. Zalewski specifically denied viewing appellant's candidacy that way.

Mr. Zalewski's conduct also does not reach the standard of being "clearly against reason and evidence." The Commission accepts the testimony of Mr. Zalewski that he encountered "significantly more violations" on the elevators serviced by appellant that for other elevator technicians. This observation was seconded by Tim Marty, even though Mr. Marty was identified as a reference on appellant's resume. Mr. Zalewski had noted that appellant smelled of alcohol on two different occasions on one work site in approximately 1993. Also, on one occasion he observed appellant limping badly at the job site and appellant complained that it was difficult to maneuver. These observations by Mr. Zalewski were corroborated by Mr. Rather. The Commission acknowledges the appellant's testimony to the effect that he did not have frequent direct contact with Mr. Zalewski. However there was still some direct contact between the two and Mr. Zalewski also inspected the elevators serviced by the appellant. These interactions were a sufficient basis for the information that Mr. Zalewski provided to Mr. Burks.

On a related note, it is undisputed that during the course of appellant's interview, one of the interviewers referred to the existence of "bad blood" between Mr. Zalewski and the appellant. The appellant has failed to show that any such animosity had some bearing on the reliability of Mr. Zalewski's observations of appellant's work performance. Appellant offered no explanation as to the reason for a poor relationship

between appellant and Mr. Zalewski, so it is difficult to assess how that relationship might have had an impact on Mr. Zalewski's observations. Corroboration of appellant's performance problems by other persons also supports the conclusion that any "bad blood" did not have an effect on Mr. Zalewski's comments about the appellant.

For all of the above reasons, the Commission concludes that respondent, in the person of either Bennette Burkes or Bernie Zalewski, did not take a personnel action regarding appellant that was "clearly against reason and evidence."

Illegal action aspect of case

Appellant contends that Mr. Burks violated §230.43(2), Stats., by obtaining "slanderous, secret and untrue information" about the appellant. Section 230.43(2) reads:

> Whoever, after a rule has been duly established and published, makes an appointment to office or selects a person for employment, contrary to such rule, or wilfully refuses or neglects otherwise to comply with, or to conform to, this subchapter, or violates any of such provisions, shall be guilty of a misdemeanor. If any person is convicted under this subsection, any public office which such person may hold shall by force of such conviction be rendered vacant, and such person shall be incapable of holding public office for a period of 5 years from the date of such conviction.

While this section makes it a misdemeanor to violate a published rule when making a selection decision, the statute does not create any rules governing the selection process. Therefore, appellant fails in his contention that respondent, in the person of Mr. Burks, violated §230.43(2).

The appellant also contends that respondent "may have been impermissibly motivated . . . by concerns about foot (sic) and alcoholism." Appellant goes on to reference both the Fair Employment Act (FEA) and the Americans with Disabilities Act (ADA). The ADA is a law adopted by the United States, rather than by the State of Wisconsin, and the Wisconsin Personnel Commission has no authority to review allegations filed under the ADA. However, pursuant to §111.375(2), the Commission does

have jurisdiction under the FEA with respect to claims filed against agencies of the State of Wisconsin in their capacity as employers. Respondent has not objected to consideration of such a claim, so the Commission will proceed to address complainant's allegation as if he had filed a complaint of discrimination based on disability and alleged a violation of §111.322.

There are three essential elements in a disability discrimination claim. First, the Complainant must establish that the condition at issue is a disability within the meaning of the Wisconsin Fair Employment Act. Second, the Complainant must show that the employer's discrimination was on the basis of disability. Third, it must appear that the employer cannot justify its alleged discrimination under the exception set forth in sec. 111.34(2), Wis. Stats. *Racine Unified School Dist. v. LIRC*, 164 Wis. 2d 567, 476 N.W.2d 707 (Ct. App. 1991); *Boynton Cab Co. v. DILHR*, 96 Wis. 2d 396, 291 N.W.2d 850 (1980).

The appellant has alleged two actual or perceived disabilities. In his testimony, appellant admitted to a problem with alcohol abuse. He testified that he "decided to quit [drinking]" on April 14, 1995, and began treatment on April 22, 1995. Treatment consisted of a three day per week outpatient program and weekly Alcoholics Anonymous meeting. Appellant's subsequent treatment program, which lasted about a year, consisted of 2 weekly Alcoholics Anonymous meetings. Appellant did not offer any expert testimony to the effect that he suffers from alcoholism, nor did the appellant go beyond his statement that he has a problem with alcohol abuse.

Pursuant to §111.32(8), Stats:

> "Individual with a disability" means an individual who:
> (a) Has a physical or mental impairment which makes achievement unusually difficult or limits the capacity to work;
> (b) Has a record of such an impairment; or
> (c) Is perceived as having such an impairment.

Alcoholism may constitute a disability within the meaning of the Fair Employment Act. *Squires v. LIRC*, 97 Wis. 2d 648, 294 N.W.2d 48 (Ct. App. 1980). However, the diagnosis of alcoholism is a matter of expert medical opinion to be proved by a physician

and not by a layman. *Connecticut General Life Ins. Co. v. DILHR*, 86 Wis. 2d 392, 273 N.W.2d 206 (1979). The appellant did not sustain his burden of proof as to §111.32(8)(a). The appellant also did not prove that respondent perceived him as being an alcoholic or believed he had a record of alcoholism. The reports to Mr. Burks were that the appellant smelled of alcohol on the job and that he had "at least two bouts with alcohol." There was no evidence that Mr. Burks perceived appellant to be an alcoholic. Therefore, the appellant fails in terms of his disability claim based on alcohol use.

Appellant's second disability claim is based on his foot ailment. Appellant contends that respondent incorrectly perceived him as being disabled in February of 1998, even though he had recovered from surgery for the condition and had been released to work by his physician. Appellant noted during his December interview for the vacant position that his foot had fully recovered. Documentary evidence supports the conclusion that the respondent perceived appellant to be disabled, due to a foot condition, at the time of the selection decision. According to Mr. Burks' February 24th memo, "I have learned that Mr. Holley . . . suffers from a foot ailment that impedes his ability to stand." The record also shows that appellant's perceived foot disability was one cause of Mr. Burks' (and, therefore, respondent's) decision not to hire the appellant for the vacant elevator inspector position. The next sentence in the February 24th memo reads: "I withdraw my recommendation." This sentence satisfies the appellant's burden of showing that the employer's conduct was based on the appellant's disability.

The burden of proof now shifts to respondent. In typical employment situations, respondent's burden is to prove that the appellant's perceived disability is reasonably related to the appellant's ability to adequately undertake the job-related responsibilities of the position. However, respondent claims that the position is one which relates to public safety: "[T]he person hired into this position would affect the public safety of

citizens of the state and others who travel in elevators."[3] This appears to be a reference to §111.34(2)(c), which provides:

> If the employment . . . involves a special duty of care for the safety of the general public, including but not limited to employment with a common carrier, this special duty of care may be considered in evaluating whether the employe or applicant can adequately undertake the job-related responsibilities of a particular job . . . . However, this evaluation shall not be made by a general rule which prohibits the employment or licensure of handicapped individuals in general or a particular class of handicapped individuals.

The stringent "reasonable probability" standard is eased where the employer's line of business is such that a number of persons could potentially be harmed by the disabled employe. Where the employment involves a "special duty of care for the safety of the general public," the employer need only show that the otherwise discriminatory practice bears a "rational relationship" to its safety obligations to the public and the employe's co- workers. *Racine Unified School Dist. v. LIRC*, 164 Wis. 2d 567, 476 N.W.2d 707 (Ct. App. 1991).

The Commission concludes that the respondent's elevator inspection program involves a "special duty of care for the safety of the general public." The specific purpose of the program is public safety. Certainly if common carriers are to be covered by this provision, elevator safety inspectors are also covered.

The "rational relationship" standard is at least similar to the "abuse of discretion" standard already applied by the Commission in this matter. Even though the standard is similar, it must be applied differently here because the rational relationship analysis relates solely to the disability claim based on the foot ailment. In contrast, the abuse of discretion analysis was based on all of performance issues known to Mr. Zalewski and Mr. Burks.

Therefore, the question is whether respondent has shown that its decision to rely on appellant's "foot problem" as a reason for not hiring him for the elevator inspector position bears a "rational relationship" to respondent's safety obligations to the public.

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[3] Respondent's post-hearing brief, page 3.

The respondent has failed to sustain this burden because it has not produced any evidence that appellant still suffered from a foot impairment in late February of 1998. Respondent did not produce any medical information on this topic. Mr. Burks relied on statements by Mr. Zalewski, Mr. Rather and Mr. Marty to the effect that the appellant's foot ailment impeded his ability to stand, that he could not stand on his feet all day, and that he had physical problems that would affect his work. Respondent never tied this lay testimony to appellant's physical condition as of February of 1998. Mr. Zalewski's observations were made in 1993 and Mr. Rather's must have been made sometime before the appellant stopped actively working for the Otis Elevator Company. The record does not indicate when Mr. Marty would have observed appellant's work. On the other hand, the appellant has testified: 1) he was off work for around 14 months due to his foot condition; 2) the first part of this absence was a medical leave, but he received unemployment compensation for the last portion; 3) his physician had released him to return to work by December of 1997; 4) his foot had fully recovered by that date; and ; 5) he began working with Schindler Elevator in February of 1998. It is undisputed that respondent never contacted anyone at Schindler about the appellant's performance in that position. A rational relationship to respondent's safety obligations cannot exist if there was no foot problem at the time the hiring decision was made. Therefore, the Commission finds that respondent discriminated against the appellant on the basis of disability when it perceived he had a foot problem and rejected him for employment as an elevator inspector.

Appellant's foot problem was only one of several reasons relied upon by the respondent when Mr. Burks withdrew his recommendation to hire appellant for the vacant position. The February 24th memo also shows that Mr. Burks concluded the appellant had "problems with on-the-job alcohol use" and that he had a history of "not maintaining elevators properly." Mr. Burks also testified that he withdrew his recommendation to hire the appellant because fewer than 5 interviews had been conducted for the position in question, which was contrary to the policy announced by Mr. Corry.

"A mixed motive case is one in which the adverse employment decision resulted from a mixture of legitimate business reasons and prohibited discriminatory motives." *Hoell v. LIRC*, 186 Wis. 2d 603, 608, 522 N.W.2d 234 (Court of Appeals, 1994). In *Hoell*, the court adopted the mixed motive test as interpreted under federal Title VII cases and applied it to cases filed under the Wisconsin Fair Employment Act. The court quoted, with approval, the Labor Industry Review Commission's summary of the appropriate remedies in a mixed motive situation:

> [I]f an employe is terminated solely because of an impermissible motivating factor, the employe normally should be awarded a cease and desist order, reinstatement, back pay, interest, and attorney's fees under the Wisconsin Fair Employment At. If an employe is terminated in part because of other motivating factors, but the termination would *not* have occurred in the absence of the impermissible motivating factor, the Commission has the discretion to award some or all of the remedies ordinarily awarded. Finally, if an employe is terminated in part because of an impermissible factor and in part because of other motivating factors, *and* the termination would have taken place in the absence of the impermissible motivating factor, the employe should be awarded only a cease and desist order and attorney's fees.

Respondent clearly had a number of different reasons for withdrawing the recommendation to hire the appellant. Only one of them was impermissible under the Fair Employment Act. The others, all of which were very significant, could properly be relied upon. Therefore, respondent has met its burden of establishing that it would have taken the same actions with respect to the appellant even without the discriminatory factor of appellant's foot ailment.

ORDER

Based upon the finding of illegal discrimination based on perceived disability, the parties will be provided a period of 20 days from the date this order is signed to try to reach an agreement as to the appropriate remedy in this matter. If the parties are unable to agree, the appellant is to notify the Commission and a conference will be scheduled.

Dated: _____, 1998. STATE PERSONNEL COMMISSION

_____
LAURIE R. McCALLUM, Chairperson

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DONALD R. MURPHY, Commissioner

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JUDY M. ROGERS, Commissioner